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No. 98-1811

IN THE

Supreme Court of the United States

ALEXIS GEIER, ET AL.,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE BLUE CROSS BLUE SHIELD ASSOCIATION AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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BRIEF FOR THE BLUE CROSS BLUE SHIELD ASSOCIATION AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE AMICUS CURIAE

The Blue Cross Blue Shield Association (the "Association") is the national association of local Blue Cross and Blue Shield companies.[1] The local companies provide health insurance and administer health benefits plans to private and public employees and individuals. They are subject to regulation under a variety of federal statutes, including the Employee Retirement Income Security Act (29

[1] In accordance with Rule 37.6, the Association certifies that counsel for a party did not author this brief in whole or in part and that no entity other than the Association, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

U.S.C. § 1001 *et seq.*), the Medicare Act (42 U.S.C. § 303 *et seq.*), the Health Maintenance Organization Act (42 U.S.C. § 300e), the Federal Employees Health Benefits Act (5 U.S.C. §§ 8901-8914), and the Health Insurance Portability and Accountability Act (42 U.S.C. § 1320a-7, *et seq.*). They also operate under the backdrop of extensive state regulation in their respective jurisdictions.

This case concerns the scope of federal preemption doctrine, particularly where a federal statute contains express statements concerning preemption. As entities that are subject to pervasive state and federal regulation, with several of the pertinent federal statutes containing express preemption provisions, the Association's members have an interest in the orderly development of preemption principles and, more specifically, in the consequence ascribed to statutory preemption clauses.

Counsel for the parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The threshold issue presented in this case is whether the existence of express statements concerning preemption in a federal statute forecloses all inquiry into whether a state measure conflicts with federal purposes such that it is invalid under the Supremacy Clause. The court of appeals held that the presence, in the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 15 U.S.C. §§ 1381-1431, of a preemption provision and what it termed a "savings" provision did not bar an examination of whether state law surviving those provisions might in any event be in conflict with federal law; it then found state law preempted because of a conflict. Petitioners now assert that, "[b]ecause the Safety Act contains both an express preemption provision and an express anti-preemption provision manifesting a

congressional intent not to preempt, any inquiry into implied conflict preemption is precluded." Pet. Br. at 15.

Petitioners' position squarely contradicts the history of preemption law. Traditionally, express and conflict preemption have peacefully coexisted. Express preemption derives from the Court's Commerce Clause cases. In those decisions, the Court, after much deliberation, held that Congress could occupy an entire field of commerce, but only if it clearly manifested an intent to do so. Express preemption is a branch of this power to occupy the field. Where a federal statute contains an express preemption provision or, conversely, a savings clause preserving some sphere of state authority, those provisions serve as an indication of the extent to which (if at all) Congress contemplated state regulation in the particular commercial area.

Conflict preemption analysis emanates not from the terms of the statute, but rather from the Supremacy Clause of the Constitution. The inquiry, rather than focusing on whether Congress has prohibited state regulation entirely in a field, centers on whether state law collides with federal law where the federal statute permits the states to act. If the two collide, the state law must yield under the Supremacy Clause. Recognizing their disparate roots, the Court historically has not linked conflict preemption analysis to examination of an express preemption provision. Instead, the Court has examined whether state law conflicts with Congress's design even if the state regulation withstands scrutiny under the federal statute's express preemption clause. *E.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). The only even arguable departure from that approach was the Court's analysis in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a decision that the Court has since instructed cannot be read broadly.

Moreover, there is no sound reason, at this late date, for deviating from the Court's historical approach and instead adopting a rule where the existence of an express preemption provision would defeat any conflict preemption claim. If that were the rule, Congress would have to predict all of the likely consequences of its actions and all prospective state responses, for the failure to cover a given situation in the preemption provision would result in automatic acceptance of the state's law. Awkward results would ensue, such as a finding that a federal agency's regulation does not preempt conflicting state law because the statute's preemption section did not state that it applied to state laws inconsistent with federal administrative action.

In this case, the Safety Act's preemption provision simply delineates the field that Congress intended to occupy. Because the preemption provision forbids any state from adopting an automobile safety standard that is not "identical" to a federal standard in effect, 15 U.S.C. § 1392(d), Congress has occupied the field of automobile safety standards, at least where, for example, a state regulator seeks to promulgate a standard applicable to the same equipment or aspect of performance addressed by the federal government. The so-called "savings" clause does not appear to relate to state and federal authority at all, since it merely establishes certain defenses that cannot be proffered in court litigation. In any event, whatever the specific meaning of these provisions, they are no barrier to conflict preemption. Having found that there remained an area where state action was not altogether foreclosed, the court of appeals acted fully in accord with this Court's precedents in determining that it could then conduct a conflict preemption analysis.

ARGUMENT

ONLY A RULE FAVORING THE COEXISTENCE OF EXPRESS AND CONFLICT PREEMPTION IS COMPATIBLE WITH THE HISTORY OF THE PREEMPTION DOCTRINE

A. Express Preemption Derives from the Court's Commerce Clause Jurisprudence

The preemption doctrine has its roots not in the Constitution's Supremacy Clause, but in the Commerce Clause. During the early years of the nation, the Court wrestled with the question whether the states were permitted to act in the field of interstate commerce. Initially, at least some justices took the view that the states were entirely incapacitated in any legislative matter touching on interstate commerce. *City of New York v. Miln*, 36 U.S. 102, 121 (1837) (Story, J., dissenting). That view never garnered the Court's full support; nonetheless, by 1852, in the landmark decision in *Cooley v. Board of Wardens*, 53 U.S. 299 (1852), the Court concluded that, at least in some commercial fields, state law was inoperative. Those subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Id.* at 319; *accord Welton v. Missouri*, 91 U.S. 275, 280 (1875); *Henderson v. Mayor of New York*, 92 U.S. 259, 272-73 (1876).

In the aftermath of *Cooley*, the Court developed a related principle: that even in areas that were not so national in orientation as to be altogether beyond the states' reach, state activity in those areas was forbidden once Congress "act[ed] with reference to them." *Welton*, 91 U.S. at 280. This corollary gained momentum as the 1900's began, with the Court repeatedly holding that, "if the State and Congress

have a concurrent power, that of the State is superseded when the power of Congress is exercised." *Southern Ry. Co. v. Reid*, 222 U.S. 424, 436, 442 (1912). "One authority must be paramount, and when it speaks the other must be silent." *Id.*; *accord Missouri, Kan. & Tex. Ry. Co. v. Haber*, 169 U.S. 613 (1898); *Second Employers' Liability Cases*, 223 U.S. 1, 55 (1912); *Savage v. Jones*, 225 U.S. 501, 533 (1912); *Chicago, Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U.S. 426, 435 (1913). As Justice Holmes put it, "[w]hen Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).

In these turn-of-the-century decisions lie the seeds of the preemption doctrine. The preemption doctrine, at its inception, focused entirely on whether Congress had "occup[ied] the field." *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926); *see also Savage*, 225 U.S. at 533 (using similar language); *Chicago, Rock Island. & Pac. Ry. Co.*, 226 U.S. at 435 (same). Because the rule, at that point, was that Congressional "action, when exerted, covers the whole field and renders the State impotent to deal with a subject," the central task was to determine the extent of the field that Congress had decided to occupy. *Chicago, Rock Island & Pac. Ry. Co.*, 226 U.S. at 435. Once the scope of the field was delineated, all state laws in that area were ousted. Indeed, the word preemption means, first and foremost, "to acquire" or "to seize upon to the exclusion of others," *Webster's Ninth New Collegiate Dictionary* 927 (1983), and Congress now was said – in what appears to be the Court's first use of the word – to have "preempted" a field when it legislated in that domain. *New York Cent. R.R.*

Co. v. Winfield, 244 U.S. 147, 169 (1917) (Brandeis, J., dissenting).

As sentiment changed towards greater state sovereignty, the Court repudiated earlier precedent, adopting a standard against the automatic ouster of all state laws in fields that Congress had touched. Instead, the guiding "assumption" became – and remains to this day – "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947); *accord Mintz v. Baldwin*, 289 U.S. 346, 350 (1933); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1977). Thus, the preemption inquiry shifted from determining the scope of the field that Congress intended to occupy (with that occupation then assumed to be exclusive) to ascertaining whether Congress in any manner intended exclusively to occupy the field. Typically, the appropriate question is whether "Congress has 'unmistakably . . . ordained' . . . that its enactments alone are to regulate a part of commerce," so that "state laws regulating that aspect of commerce must fall." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Florida Lime & Avocado Growers*, 373 U.S. at 142).

Because the focus had shifted to Congressional intent, preemption provisions and savings clauses now began to proliferate in legislation. *E.g.*, Communication Act of 1934, 47 U.S.C. §§ 151, 152(b) (enacted in 1934); Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 360(k) (enacted in 1938); Atomic Energy Act, 42 U.S.C. § 2021 (enacted in 1959); Employee Retirement Income Security Act, 29 U.S.C. § 1144 (enacted in 1974). While an objective to occupy a field to the exclusion of the states might be implied simply from "a complete scheme of regulation," *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941), Congress

often sought to make its will expressly known through legislative language addressing the states' authority. Hence, at this juncture, the notion of "express preemption" surfaced: to determine whether Congress intended exclusively to occupy an area, the Court would examine "whether Congress has either *explicitly* or implicitly declared that the States are prohibited from regulating." *Ray*, 435 U.S. at 157 (emphasis added).

The critical point is that the traditional preemption doctrine, including express preemption, was tied to the question whether Congress, in exercising its Commerce Clause authority, intended to occupy a field of commercial regulation, thereby annulling all state measures. A preemption provision helps define the answer, because its terms mark the extent of federal involvement or the range of state activity anticipated and permitted by Congress.[2]

B. Conflict Preemption Has Its Origin in the Supremacy Clause

Quite apart from the preemption doctrine under the Commerce Clause, the Court has long recognized the principle that state law must surrender to federal law where the two conflict. That principle derives from the Supremacy Clause, which provides that the "Constitution, and the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. *See generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 770, 809 (1994).

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[2] While the preemption doctrine developed through the Court's Commerce Clause cases, it is not limited to Congress's actions under its power to regulate interstate commerce. Congress can equally occupy specific fields of regulation (whether expressly or implicitly) in exercising authority under any of its enumerated powers.

Chief Justice Marshall first delineated the parameters of the Supremacy Clause, writing for the Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), that state laws, "though enacted in the exercise of powers not controverted, must yield" if they "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution." *See also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405-06 (1819). In the time since *Gibbons*, the Court has recognized several ways in which state law might "interfere with" federal law and therefore must, under the Supremacy Clause, give way:

> [F]ederal law may be in "irreconcilable conflict" with state law. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). Compliance with both statutes, for example, may be a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); or, the state law may "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Barnett Bank of Marion County, N. A. v. Nelson, 517 U.S. 25, 31 (1996).

Until recently, the Court had not referred to the notion that federal law overrides conflicting state law as "preemption" at all. Even after the Court began employing the term "preemption" to denote areas where Congress (under the Commerce Clause) had prohibited all state regulation, the Court carefully avoided use of the term "preemption" when discussing whether state and federal law clashed, instead putting its analysis in terms of whether the "result is impermissible, and the state law must yield to the federal." *Jones v. Rath Packing Co.*, 430 U.S. 519, 543 (1977); *accord Perez v. Campbell*, 402 U.S. 637, 652 (1971)

(the "controlling principle" is that "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause"); *see also DeCanas v. Bica*, 424 U.S. 351, 357 n.5 (1976). For that matter, the term "preemption" is somewhat of a misnomer to describe situations where state law is inoperative due to a conflict with federal law, since the area has not been "acquired" to the exclusion of the states. *See supra* p. 6; Gardbaum, *supra*, at 769-70, 808-09. Still, for better or worse, the Court's most recent precedents have used the shorthand "conflict preemption" to refer to the Supremacy Clause analysis. *E.g.*, *Medtronic v. Lohr*, 518 U.S. 470, 503 (1996); *Boggs v. Boggs*, 520 U.S. 833, 844 (1997).

Congressional intent historically has played a different role in the Court's Supremacy Clause cases than under the preemption doctrine (as developed under the Commerce Clause). Whereas Congress must clearly have evinced an intent to occupy an entire field of regulation to the states' exclusion, the Court has invalidated state laws that conflict with federal law regardless of whether Congress, in the federal statute, specifically manifested an intent to preempt contrary state law. *E.g.*, *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 470-78 (1984); *Perez v. Campbell*, 402 U.S. 637, 648 (1971); *Hill v. Florida*, 325 U.S. 538, 541-43 (1945). That is because the language of the Supremacy Clause is self-executing, itself making federal law supreme notwithstanding "any Thing in the . . . Laws of any State to the Contrary."

This is not to say that Congressional intent is irrelevant in a conflict preemption case. Congressional intent remains "'the ultimate touchstone.'" *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 290 (1986) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). The intent that matters, however, is Congress's *substantive* objective with

respect to the federal statute at issue, not the presence of a specific Congressional statement concerning the invalidity of conflicting state law. If state law "is inconsistent with the structure and purpose of the [federal] statute as a whole," *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992), or would "frustrate its objects," *Boggs*, 520 U.S. at 841, it must fall under the Supremacy Clause.

Because conflict preemption is not dependent on specific Congressional intent concerning the validity of state laws, it historically has never hinged on the presence or absence of an express preemption provision. The test under the Supremacy Clause is "'essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.'" *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Perez*, 402 U.S. at 644). If, after that process, the state law is found in collision with the federal statute, it "is rendered invalid by the Supremacy Clause," irrespective of whether Congress expressly spoke to the issue of displacement of state law. *Perez*, 402 U.S. at 652.

C. Express and Conflict Preemption Have Historically Coexisted, Notwithstanding the *Cipollone* Decision

Express preemption and conflict preemption, then, stem from different constitutional sources – the former from the Commerce Clause, the latter from the Supremacy Clause. Until very recently, there was no question that the two coexisted and thus that there could be conflict preemption, even where the federal statute contained an express preemption provision that did not in the specific circumstances apply. The Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), carefully delineates the traditional approach.

The Court there initially outlined the preemption doctrine. "The first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S. Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case." *Jones*, 430 U.S. at 525. The Court began with a presumption against finding federal exclusivity, but added that a complete ouster of the states from "the field" would occur where Congress had so "compelled." *Id.* And that result could occur "whether Congress' command is explicitly stated in the statute's language," such as through an express preemption provision, "or implicitly contained in its structure and purpose." *Id.*

After noting that initial inquiry, the Court then turned to the Supremacy Clause (and abandoned the term "preemption"). "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI." *Jones*, 430 U.S. at 525-26. On this front, the Court's "task is 'to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." *Jones*, 430 U.S. at 526; *accord Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983) (treating separately concepts of occupation-of-the-field and conflict preemption); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (noting that the "perplexing question [is] whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide").

Accordingly, as historically understood, there were two kinds of preemption – occupation-of-the-field preemption and conflict preemption (the latter not being "preemption" in its literal sense). An express preemption provision bore solely on the first category of preemption, for it assisted the Court in discerning whether Congress had sought to make the subject matter an exclusive federal domain or whether Congress intended to leave room for the states; at the same time, Congress's occupation of the area could also be implied from the statute's overall comprehensiveness and structure. Conflict preemption focused only on the question whether, in a field where Congress had evinced no intent to oust the states completely, state law in the particular case nevertheless frustrated Congress's purposes. An express preemption provision did not pertain to this latter issue; nor did an express preemption provision's inapplicability bear on the conflict preemption inquiry. In fact, in the *Jones* case itself, the Court found that an express preemption provision in the relevant federal statute did *not* foreclose the state's law. But the Court then struck down the state law because it "would prevent 'the accomplishment and execution of the full purposes and objective of Congress' in passing the [federal statute].'" *Jones*, 430 U.S. at 543 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S 133, 139 (1990) (holding that, even if the state law survived ERISA's express preemption provision, it must be struck down as in conflict with an existing federal cause of action).[3]

[3] Some of the Court's decisions speak of three categories of preemption: express, occupation-of-the-field, and conflict. *E.g.*, *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). That categorization does not quite hit the mark. For instance, it is not correct to separate express and field preemption, since an express preemption provision can establish the parameters of the field that is (or is not) occupied. On a related issue, the court of appeals referred to its conflict preemption analysis as "implied" preemption. That is technically true, since conflict preemption is always *inferred* from the statute's terms, purposes, and structure. But occupation-of-the-field preemption is also sometimes termed "implied" preemption, since an intent to occupy the area can be implied from a

That is where things stood, until *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). In that case, the Court, for the first time, arguably suggested that the inapplicability of an express preemption provision might foreclose further inquiry into whether, under the Supremacy Clause, state law posed an obstacle to federal objectives. The Court said:

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S. [497, 505 (1978)], "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 93 L. Ed. 2d 613, 107 S. Ct. 683 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of expressio unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

Cipollone, 505 U.S. at 517; *see also id.* at 532 (Blackmun, J., concurring) ("We resort to principles of implied pre-

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comprehensive or pervasive statutory scheme rather than express statutory terms. *See id.* In light of these esoteric matters, it may be best to refer to two categories – occupation-of-the-field and conflict – with the former having two subcategories (express and implied). That division likewise establishes the doctrinal divide based on the portion of preemption analysis that originates in the Commerce Clause (occupation-of-the-field) and that which stems solely from the Supremacy Clause (conflict).

emption – that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law – only when Congress has been silent with respect to pre-emption.") (internal citation omitted). *But see id.* at 547 (Scalia, J., dissenting) ("we have never expressed such a rule before, and our prior cases are inconsistent with it," and then citing the *Jones* case).

Almost immediately after *Cipollone*, and as litigants sought to use the decision to support a revolutionary rule against conflict preemption (as Petitioners seek to do here), the Court addressed the confusion. In *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 289 (1995), the Court held that *Cipollone* did not establish "a categorical rule precluding the coexistence of express and implied pre-emption"; "[a]t best *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." Then, in *Boggs v. Boggs*, 520 U.S. 833, 844 (1997), the Court bypassed entirely ERISA's express preemption provision, 29 U.S.C. § 1144, and held that "[w]e can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects." Other recent decisions likewise assume the coexistence of express and conflict preemption. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 503 (1996) (holding that scope of express preemption "may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis"); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (noting that courts should turn to conflict preemption if "explicit pre-emption language . . . does not directly answer the question").

In the long history of the preemption doctrine, therefore, *Cipollone* stands alone. If read as Petitioners assert, it, unlike any decision before it or since, deemed a statutory preemption provision as not just an expression of Congress's

will concerning whether the federal government would occupy exclusively a field of commerce, but conceivably also as a limit on Supremacy Clause analysis.

Even the more diluted statement in *Myrick* that an express preemption provision establishes an "inference" regarding the full scope of preemption is problematic. Traditionally, Congress's intent (whether express or implied) as to prohibiting state regulation in a field had no relation to the separate and distinct issue whether state law, in an individual case, stood as an obstacle to federal legislation. Put simply, a rule that conflict preemption cannot occur if a statute contains an express preemption provision – *i.e.*, the position Petitioners say was adopted in *Cipollone* – has no grounding in constitutional history and blurs a long-settled distinction between doctrines emanating from different constitutional bases.

D. There Is No Sound Reason for Departing, at this Late Date, from the Historical Rule

Given that the rule of coexistence is deeply ingrained in this Court's precedents, it should take, at a minimum, compelling reasons to jettison it. No such reasons exist. To the contrary, recognition of a bar to conflict preemption where a statute contains an express preemption clause could create enormous difficulties and awkward results.

1. Rejection of the traditional understanding concerning occupation-of-the-field preemption (including its express-preemption branch) and conflict preemption would wreak legislative havoc. Congress has adopted all of the express preemption language contained in the U.S. Code against the backdrop that, regardless of its actions, state law will not stand if, in a particular context, it conflicts with federal law. Were the Court to take that safety valve away, Congress

would be forced to re-legislate in many areas now to provide specifically for the invalidation of conflicting state law.

"Stare decisis has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (quoting *Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. 197, 202 (1991)). In this case, the Court should abide by its long-held view that express and conflict preemption can coexist, because "Congress has legislated with an expectation that [that] principle will apply." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

2. Were the Court to shift toward a preemption regime like the one Petitioners claim the Court espoused in *Cipollone*, Congress – if it wished to enact a law containing a preemption provision – would be placed in the impossible position of seeking to prophesy all of the potential ramifications of that new law. For once Congress enacted a preemption clause, any state action beyond its explicit scope would survive, even though the federal statute's structure or purpose might be undermined. Thus, Congress would be left to contemplate each and every law a state might pass and its effect on the federal legislative purpose, so as to ensure that the matter is addressed in the preemption provision. Under Petitioners' reading of *Cipollone*, "[t]he statute that says anything about pre-emption must say everything." *Cipollone*, 505 U.S. at 548 (Scalia, J., dissenting). "If this is to be the law, surely only the most sporting of Congresses will dare to say anything about pre-emption." *Id.*

It is unreasonable to expect Congress to be perfectly clairvoyant. "Congress, embroiled in controversy over policy issues, rarely anticipates the possible ramifications of

its acts upon state law." Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan L. Rev. 208, 209 (1959). Rather than burden Congress with the task of defining with "great exactitude" all of its preemption objectives, *Cipollone*, 505 U.S. at 548 (Scalia, J., dissenting), the better approach is simply to leave in place the historical rule that, whatever Congress might say expressly about prohibiting or allowing state regulation in the area, the Supremacy Clause stands ready to strike down state law that ultimately upsets federal goals.

3. A rule that conflict preemption is forbidden where a statute contains an express preemption provision would create anomalous results. "If taken seriously, it would mean, for example, that if a federal consumer protection law provided that no state agency or court shall assert jurisdiction under state law over any workplace safety issue with respect to which a federal standard is in effect, then a state agency operating under a law dealing with a subject other than workplace safety (e.g., consumer protection) could impose requirements entirely contrary to federal law – forbidding, for example, the use of certain safety equipment that federal law requires." *Cipollone*, 505 U.S. at 547 (Scalia, J., dissenting). By limiting the prohibition on state court jurisdiction to state work safety laws, Congress unwittingly would have permitted the states to undermine federal objectives through state measures not focused upon work safety.

The results also would be particularly "mischievous," *see id.*, where Congress has enacted a preemption provision and at the same time has delegated authority to a federal agency. Congress may have determined that state laws in a particular area should not be altogether ousted; at the same time, the federal agency, exercising its lawful authority, may have promulgated regulations in the area. Were state law to conflict with the federal regulation, the state statute would

stand, since local regulation was allowable under the preemption clause. The only way to stop the state assault on the federal administrator's activity would be for Congress to use magic words in the preemption section that also would permit federal regulations to preempt conflicting state laws. That federal regulations supersede inconsistent state measures is already a fundamental tenet of Supremacy Clause doctrine. *See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-154 (1982). Congress, however, would need to enact the principle into every statutory scheme where it has adopted a preemption provision, if it wants the principle to have continued life.

For all of these reasons, the Court should reject a rule that the applicability of an express preemption provision forecloses conflict preemption. The Court should adhere to its traditional approach that a Supremacy Clause analysis may occur, even if a statute contains an express preemption provision that "does not directly answer the question." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

E. The Preemption Provision and the So-Called Savings Clause at Issue in this Case Should Not Prohibit the Court from Undertaking a Conflict Preemption Analysis

The court of appeals in this case correctly noted that the presence in the Safety Act of an express preemption provision and what it termed a "savings" clause should not foreclose a conflict preemption analysis. The Safety Act's preemption provision provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in

> effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). The Safety Act also states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *Id.* § 1397(k).

Consistent with the historical underpinnings of the preemption doctrine, the Safety Act's preemption provision delineates the field that Congress sought to occupy. It indicates that Congress may have endeavored to occupy the field of safety standard regulation to the exclusion of the states, such that a state regulatory agency or legislature, for instance, would be barred from imposing safety standards at the manufacturing stage in their states. Section 1397(k), in turn, does not appear to address any matter of state-federal relations at all, focusing instead on the sorts of defenses that are or are not available in court suits.

Whatever the proper reading of these provisions, the court of appeals – in light of the historical development of the preemption doctrine – was free to determine whether, in an area where the states were not prohibited altogether from acting, the state action would still conflict with Congress's (or the National Highway Traffic Safety Administration's) objectives.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted

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